



January 31, 2003

Ms. Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-A325
Washington, DC 20554

RE: Rules and Regulations Implementing the Telephone Consumer Protection Act
CG Docket No. 02-287

Dear Ms. Dortch:

On behalf of the 2,600 member companies of the Mortgage Bankers Association of America ("MBA"), we offer our reply comments on the Federal Communications Commission's ("FCC" or the "Commission") notice of proposed rulemaking to amend its rules implementing the Telephone Consumer Protection Act of 1991 ("TCPA"). We appreciate the opportunity to offer our views; particularly now that the Federal Trade Commission ("FTC") has issued its final rules amending the Telemarketing Sales Rule ("TSR"). Our reply comments are focused on the do-not-call ("DNC") list issue.

With two agencies creating federal rules (on top of potentially 50 different state laws), MBA's members are placed in a difficult position. Some of our members (those that are non-banks) would be subject to both an FTC list and an FCC list. Others would be subject to just an FCC list (those that are banks). All are currently subjected to state lists in those states that have lists (except to the extent that our members are exempt as discussed below). MBA believes that the concept of up to 52 sets of conflicting rules will create a regulatory morass that will stifle the American economy.

MBA notes at the outset that we do not support the concept of a DNC list. We question whether it is needed and whether such a list conflicts with the protections afforded commercial speech under the First Amendment. With \$276 billion of goods and

services purchased as a result of outbound telephone calls from businesses,¹ we cannot believe consumers actually wish to stop all calls. Clearly, there are some calls that consumers wish to take that would be blocked if they were to add their numbers to a DNC list.

At this time, MBA urges the FCC not to create a DNC list. Should the FCC move forward, however, we believe that the FCC must be careful to not merely rubberstamp the actions of the FTC. The FTC's jurisdiction is limited to interstate calls, whereas the Commission's jurisdiction would cover both intrastate and interstate calls. We are concerned that if the Commission chooses to create a DNC list, it could have a tremendous impact on businesses that make mostly intrastate calls because the scope of the TCPA includes such calls.

If the Commission chooses to go forward, it must follow the requirements of the TCPA. One of the key provisions of the TCPA is the requirement that the FCC consider whether to treat "local telephone solicitations" differently than other types of calls.² Because the TCPA reaches all telephone solicitations, and not just interstate calls (as does the TSR), Congress recognized that local telephone solicitations would be subject to the rules crafted by the Commission. Simply put, an FCC DNC list would impact not just large national companies that make calls from one or two central locations, but also businesses that make calls to customers in their communities. The relevant legislative history is enlightening:

Mr. GORE: Furthermore, I also noticed that the committee has directed the FCC to consider whether the procedures eventually adopted should apply to businesses that conduct primarily local telephone solicitations. While the committee cites small businesses and holders of second-class mail permits such as newspapers as two examples of companies that conduct these types of solicitations, am I correct in my understanding that any company conducting primarily local telephone solicitations might be included in this category? It would seem that the provision should apply to companies that conduct business locally, and thus become part of the community, and are subject to the scrutiny of the community, and must live by their reputation in the community, regardless of the specific type of business they conduct. For example, one of my constituents, Olan Mills, has photography studios located across the country. However, each location generally conducts its solicitations directly from the studio, within the local community. Nearly all of these calls are local in nature, and rarely cross State boundaries unless the studio is located in a community near a State line. Am I correct in believing that this is the kind of business meant by the committee to be considered under this provision?

¹ By comparison, Internet sales accounted for only \$48 billion in 2002. Online Retailers Had Good Holiday, *Business Courier* (Jan. 10, 2003).

² 47 U.S.C. § 227(c)(1)(C).

Mr. PRESSLER: Yes, that is correct.³

The mortgage industry is predominantly a local industry – even large national companies do business locally as then Senator Gore described. MBA believes that the key to a properly crafted DNC list is to exclude local telephone solicitations. Senator Gore’s description focuses on two things: physical presence and a face-to-face meeting. Because a physical presence is required to conduct face-to-face meetings (either at an office of the caller or at the called party’s residence), the key to such an exemption is the face-to-face meeting. Therefore, MBA believes the proper way to define a “local telephone solicitation” is a call that does not result in a completed transaction, but that requires the customer meet with the caller in order to close the transaction (“face-to-face call”).

Such a definition requires a physical presence in the community. It is hard to conceive of a business that uses the phone to make a sale (but that does not currently require a face-to-face meeting) changing its methods to include a meeting in order to avoid the DNC requirements. If a marketer has only a few branches from which it makes calls, it would be difficult to add locations around the country for such meetings.

Furthermore, MBA believes that it is essential to provide a bright-line rule. If local is defined just geographically and not with a face-to-face component, it will be difficult to administer. The called party will know, based only on the information in the call, whether it is a face-to-face call or not. The called party will not know (or would have to rely upon the representations of the caller) whether the caller is located in a certain geographic area.

Many states that have DNC lists include face-to-face exemptions. Thus, in those states with face-to-face exemptions, our members are exempt from the DNC requirements. If the FCC were to act, it could eviscerate the protections those states have for “local calls” – i.e. those made for the purpose of scheduling a face-to-face meeting.

The mortgage industry is different from the “typical telemarketer” in that the initial phone call is not the only phone call. The first phone call typically provides the consumer with information about the availability of refinancing options. The consumer need not make an on-the-spot decision (in fact various regulations prevent the consumer from obtaining a mortgage on the spot). Rather, the first call begins the process of refinancing rather than completes the process. Although this may be “encouraging” the purchase of goods or services, as the TCPA defines telephone solicitation, the initial telephone call is an information vehicle.

Restricting the flow of information about financing opportunities could be devastating to the U.S. economy. Home sales are one of the few bright spots in the economy.

³ 137 Cong. Rec. S16,204 (daily ed. Nov. 7, 1991) (statements of Senators. Gore and Pressler).

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Refinancing allows consumers to pay down debts, or to have additional disposable income – an essential element of an economic recovery. By creating a narrow exemption for face-to-face calls, the FCC can prevent great harm to a vital sector of the economy.

If you would like to discuss our proposals in greater detail, please do not hesitate to contact me or Vicki Vidal at 202/557-2861.

Sincerely,

/s/
Stephen A. O'Connor
Vice President, Government Affairs